Nos. 20785 and 21377

In the

United States Court of Appeals

For the Ninth Circuit

THE WESTERN PACIFIC RAILROAD COMPANY and the SOUTHERN PACIFIC COMPANY, suing on their own behalf and on behalf of all other railroads similarly situated,

Appellants,

vs.

HOWARD W. HABERMEYER, THOMAS M. HEALY, and A. E. LYON, individually and as members of the Railroad Retirement Board, et al.,

Appellees.

Appellants' Petition for Rehearing

(With Suggestion for Rehearing en Banc)

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To the Honorable Judges of the United States Court of Appeals for the Ninth Circuit:

Come now the appellants in the above-entitled cases and respectfully request that the Court grant a rehearing therein.

I. The principal, if not the sole, ground upon which the Court has affirmed the judgments below is that, in the view of the Court, Subsection 5(g) of the Act expressly precludes judicial review, *of any sort,* at the instance of the employer, of *any* Board decision granting a claim for unemployment benefits.* (Opinion, pp. 5-10.)

We believe that in arriving at this conclusion, the Court has failed to come to grips with the implicit assumptions upon which its decision necessarily rests: that Congress intended, by Subsection (g), to make the Board the sole and final arbiter of the meaning of the Act and of its own jurisdiction thereunder; and that, consistently with Article III and with Due Process of Law, all judicial review of any sort can be denied with respect to agency action which is contrary to statute and which seriously affects personal or property rights.

These assumptions are alien to our system of justice. They have been disapproved, over the course of a hundred years, by numerous decisions of the Supreme Court of the United States. They were rejected most recently in *Abbott Labs. v. Gardner,* 387 U.S. 136 (1967), and related cases, decisions to which the Court refers (Opinion, pp. 5-6), but which it fails to answer.

II. Accordingly, appellants respectfully request a rehearing upon each of the following grounds:

First. The Court has failed even to consider the Board's flagrant distortion of the meaning of the Disqualifying Conditions of the Act. As appellants have shown (Br. 23-32; R. Br. 5-8), the Board's interpretations of the provisions of Section 4(a-2)—and of the critical words "work" and "good cause"—are wholly at odds both with their meaning and with the manifest purposes of the Act. The Court has not even addressed these

*Except, of course, where the employment relationship is denied.

matters, and apparently regards them as immaterial to its decision.* Yet, if the Court is correct, it necessarily follows that the Board may, whenever it chooses, wholly nullify any provision of the Act by pretending, as in the present case, that it means something other than what it says.

Second. **The Court appears to have glossed over the Board's failure to make the mandatory findings and conclusions concerning the applicability of the Disqualifying Conditions.** It seems possible that the Court has misconstrued appellants' argument upon this point. Thus, according to the Opinion (pp. 4-5), appellants argue that the Board must make specific, formal findings on a "claim by claim basis," even when blanket findings may properly apply to a large class of applicants, and when the applicants' individual circumstances are wholly immaterial. Having in mind the vast numbers of claims processed by the Board each year, this argument plainly borders upon the absurd. The difficulty is that the argument is not the one which appellants advance; for, as has been said repeatedly in our briefs (*e.g.,* Br. 20-21; R. Br. 2-3), we contend no more than this: that where the circumstances of the individual claimants are, in fact, crucial to eligibility, the Board *must* explore those individual circumstances. As appellants have shown at some length (Br. 20-32; R. Br. 5-8), and indeed, as is substantially admitted by appellees (Appellees' Br. 25-28; see R. Br. 6-7), this was a duty which, in the case of the C(6) firemen, the Board clearly failed to perform. Moreover, the same conclusion would follow even if the Court were prepared to accept appellees' bizarre interpretations of the Disqualifying Conditions themselves (R. Br. 6-7).

The Court suggests, however, that the certification of the claims for payment pursuant to the directions in the Carter memorandum constituted the findings and conclusions required by the statute

*See, *e.g.,* page 5 of the Opinion, where the Court implies that it is of no consequence that the Board's conclusions may be "incorrect," as well as page 9, where the Court suggests that the Board's "legal conclusion relative to C(6) firemen"—however erroneous—is immunized from review by Subsection (g).

(Opinion, pp. 4-5). Such certifications may indeed have constituted findings and conclusions as to some matters—as, for example, that the claims in question had been filed by C(6) firemen. But they obviously could not have constituted the findings required by Section 4(a-2) upon those matters which the Carter memorandum expressly made immaterial: whether leaving of work was "with good cause"; whether the comparable jobs constituted "suitable work"; and whether such work was rejected "without good cause." It is undisputed that, upon these subjects, no findings were ever made. It necessarily follows that the payment of the benefits was contrary to the procedures established by the statute and therefor in excess of the jurisdiction of the Board.

Third. The Court has improperly assumed that Congress intended to make the Board the sole and final arbiter of the meaning of the Act and of its own powers thereunder. As has been seen, the Court has apparently deemed it immaterial, in determining the effect of Subsection (g), that the Board has ignored the meaning of the statute and the procedures which it prescribes. The Court's decision therefore means that no court, at any place or time, or under any circumstances, may review the actions of the Board—no matter how erroneous they may be, or how flagrantly contrary to the provisions of the Act. As the Supreme Court has said upon numerous occasions, such a notion is wholly foreign to the doctrine of the Separation of Powers and to the nature of the Judicial Process, and raises Constitutional questions of the most serious nature (see, *e.g.*, the cases cited at Br. 54-55).

Is there, in the words of Mr. Justice Harlan, "clear and convincing evidence"* that Congress intended such a result? Or can the language of Subsection (g) be squared with the fundamental principles of our system of justice? We submit that, to the first question, the answer must be "no" and, to the second, a resounding "yes." Thus, when Congress bestowed finality upon the Board's "conclusions of law" it must have had in mind those con-

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**Abbott Labs. v. Gardner,* 387 U.S. 136 (1967) at 140 and note 2.

clusions which resulted from the application of the law (the statute) to the particular facts—and not to the Board's erroneous constructions of the statute itself. And in giving finality to "findings" and to "conclusions," Congress plainly could have intended to bestow its blessings only upon such findings and conclusions as were in fact *made*—and not upon the Board's *failure* to make the findings and conclusions which the statute required.

In short, the statute does not compel the result which the Court has reached, and Article III of the Constitution does not permit it.

Fourth. The Court's denial of any judicial review whatever, at any time or place, clearly deprives appellants of Due Process of Law. This is not a case where judicial review has merely been deferred pending further agency action, or has simply been directed into special channels. It is a case where, if the decision of this Court stands, appellants can have no right of review before any court at any time. Such a right, however, is of the very essence of Due Process. This principle—apparent as it may be—has been declared upon numerous occasions (See, *e.g.*, the authorities cited at Br. 55-56). It was expressed most recently by Mr. Justice Fortas (joined by the Chief Justice and Mr. Justice Clark)* in *Abbott Labs. v. Gardner* and the related cases:

> "[F]undamental principles of our jurisprudence insist that there must be some type of effective judicial review of final, substantive agency action which seriously affects personal or property rights." (387 U.S. at 177)

III. In affirming the decisions below, the Court has necessarily decided these Constitutional questions adversely to appellants—and to the Constitution. Yet, such questions were not considered—or even mentioned—anywhere in the Court's opin-

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*Though Justice Fortas was dissenting, in part, from the decisions of the majority, it is apparent that, upon this point, all Justices found common ground. Justice Fortas' principal objection to the majority decision in *Abbott* was that, given the Constitutional requirement of effective judicial review of all final agency action, the timing and the means (though not the availability) of such review were subject to Congressional control—and that the majority in *Abbott* had failed to ascertain Congress' true intent. 387 U.S. at 177 and note 2; 184 and note 11; 185.

ion. Appellants submit that, before this Court sanctions a major dilution of the Judicial Power and finally obliterates a Constitutional right, it should at least confront directly the nature and implications of its decision.

Appellants respectfully request that the petition for rehearing be granted, and suggest, because of the great significance of the Constitutional questions which must be decided, that the cases be set down for rehearing en banc.

Dated: September 20, 1967

Respectfully submitted,

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Of Counsel

CERTIFICATE

I hereby certify that in my judgment this petition for rehearing is well founded. I further certify that it is not interposed for delay.

RICHARD MURRAY